IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILFREDO SERRANO and JOSE DIAZ on behalf of themselves and others similarly situated, Plaintiffs, v. I. HARDWARE DISTRIBUTORS, INC. d/b/a NUNEZ HARDWARE, JUVENAL NUNEZ and IRMA NUNEZ Defendants.	**No. 14-cv-2488 (PAC)**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS', I. HARDWARE DISTRIBUTORS, INC. JUVENAL NUNEZ and IRMA NUNEZ'S, MOTION TO DISMISS

Defendants I. Hardware Distributors, Inc. d/b/a Nunez Hardware, Juvenal Nunez and Irma Nunez respectfully submit this memorandum of law in support of their motion to dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

In an attempt to get rich quick Plaintiffs have joined forces to bring an action against the defendants herein alleging that they were cheated out of pay based on the time that they worked at defendants numerous hardware stores. To effectuate the scheme, Plaintiffs changed the trade name of the primary defendant I. Hardware Distributors, Inc. who does business as "Nunez Depot" (see below), to "Nunez Hardware" in order to affiliate it with other stores that have similar names.

Notwithstanding that the complaint makes no mention of defendant Irma Nunez, fails to provide any specific allegations regarding Juvenal Nunez, or that Mr. Diaz never claims to have worked for "Nunez Depot", plaintiff's nevertheless make the audacious claim that they are entitled to past wages, damages, fees and costs from these individuals.

For the reasons outlined below Plaintiffs' complaint should be dismissed with prejudice.

STATEMENT OF FACTS

Two plaintiffs, Wilfredo Serrano ("Serrano") and Jose Diaz ("Diaz") bring this action alleging violations of the FLSA and NYLL with respect to unpaid minimum wages, unpaid overtime, spread of hours, and notice and recordkeeping violations against their alleged employers "I. Hardware Distributors, Inc. d/b/a **Nunez Hardware**" located at 4145 Broadway,[1] Juvenal Nunez, and Irma Nunez.

Mr. Serrano alleges that he worked as a stock person and cashier for "**Nunez Hardware**" located at 4147 Broadway, and additional "**Nunez Hardware**" locations at 756 West 181st Street, New York, NY 10033 and 2800 3rd Avenue, Bronx, NY 10455 from September 1999 – July 2013. (Compl. ¶ 18-19).

Plaintiff Mr. Diaz alleges that he worked as a stockperson and cashier for two "**Nunez Hardware**" locations at 1267 St. Nicholas Avenue, New York, NY 10033 and 756 West 181st Street, New York, NY 10033 from 2005 to January 2014. Importantly, the named corporate defendant, I. Hardware Distributors, Inc. does not do business as "Nunez Hardware" and is not located at *either* of these locations. Moreover, Mr. Diaz has failed to allege that he was an employee of Defendant I. Hardware Distributors, Inc. (See. Ex. A - picture of the storefront for Defendant I. Hardware Distributors, Inc. indicating that it does business as Nunez Depot.)

In addition to the overreach outlined above, other than listing her as a defendant, the complaint fails to make any mention of defendant Irma Nunez. Indeed, she is not even listed in the parties section. (Compl. ¶¶ 6 -17).

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[1] For the purposes of this brief the addresses listed for I. Hardware Distributors, 4145 Broadway and/or 4147 Broadway, are one in the same.

Similarly, there are no particularized allegations against defendant Juvenal Nunez. Indeed the only allegation against Mr. Nunez is that he is believed to be a principal of I. Hardware Distributors, Inc. (Compl. ¶ 9)

With respect to alleged unpaid overtime, the extent of Plaintiffs' allegations are that they "worked over forty (40) hours per week," "often worked over ten (10) hours per day," and worked 6 days a week for an average of 60 or 62 hours per week. (Compl. ¶ 20-21 and ¶ 24-25). At no point in the Complaint does either Plaintiff state specifically a work week in which either of them worked in excess of 40 hours but went uncompensated for that time.

In sum, the complaint fails to plead that these Defendants harmed Plaintiffs in any way.

ARGUMENT

I. PLEADING STANDARD

To survive a motion to dismiss under Rule 12(b)(6) plaintiffs must plead enough facts to "to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although factual allegations are assumed to be true, they must still be sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The plausibility standard requires more than a showing of "sheer possibility that the defendant has acted unlawfully" and requires a plaintiff to make "more than an unadorned, the-defendant-unlawfully-harmed-me accusation . . . devoid of 'further factual enhancement.'" *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 557). To meet this standard, a plaintiff must plead sufficient factual content to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Pleadings that contain "no more than conclusions…are not entitled to the assumption of truth" otherwise applicable to complaints in the context of motions to dismiss. *Id.* at 679.

II. PLAINTIFFS FAIL TO ADEQUATELY PLEAD THAT DEFENDANTS WERE THEIR EMPLOYERS

Plaintiffs in this action assert claims against all three defendants in this action alleging the failure to pay minimum wage and overtime wages in violation of the FLSA and NYLL. The FLSA and NYLL minimum and overtime wage provisions apply only to "employees" who are "employed" by "employers." As a prerequisite to bringing an action under those statutes a plaintiff must first allege that he is or was "any individual employed by an employer." *See* FLSA §§ 206(a), 207(a)(1), 203(e)(1); NYLL § 651. Here, neither plaintiff has alleged even this basic requirement.

A. PLAINTIFFS FAILED TO PLEAD THAT IRMA NUNEZ WAS THEIR EMPLOYER

For the Plaintiffs' claims against Ms. Irma Nunez to proceed, the Complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Put another way, the Complaint's "non-conclusory factual content," must allow us to draw the reasonable inference that Ms. Irma Nunez was the Plaintiffs' "employer" and is liable for violations of the FLSA and NYLL.

With respect to Defendant Irma Nunez, however, the Complaint is completely devoid of *any* factual content underlying Plaintiffs' alleged FLSA and NYLL claims directed against her. Ms. Nunez is not even referenced or discussed in the section of the Complaint entitled "Parties." (Compl. ¶ 6 – 17), much less anywhere in the Complaint. Plaintiffs' allegations with respect to

Ms. Irma Nunez, cannot even be described as threadbare, boilerplate, or conclusive under *Iqbal* and *Twombly* – they are just non-existent.

Indeed, it is hard to imagine what *facts* underlie the inclusion of Ms. Irma Nunez in this complaint. At a minimum, plaintiffs should be required to plead their factual basis for naming her in this action.

Given the complete lack of any factual content with respect to Defendant Irma Nunez, all claims against her should be dismissed with prejudice.

B. PLAINTIFFS FAILED TO ADEQUATELY PLEAD THAT I. HARDWARE DISTRIBUTORS, INC. WAS THEIR EMPLOYER

1. Diaz Lacks Standing to Sue I. Hardware Distributors, Inc.

Standing is a threshold issue. If a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the underlying merits of the case. *Cavallaro v. UMass Memorial Healthcare, Inc.*, No. 09-FDS2013 WL 360405, *3 (D. Mass. 2013) (quoting *United States v AVX Corp*., 962 F.2d s Constitution, a plaintiff must demonstrate that he (1) has suffered "injury in fact," (2) that the injury 108, 113 (1st Cir 1992)). To satisfy the "case" or "controversy" requirement of Article III of the United State is "fairly traceable" to the actions of the defendant, and (3) that the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992)). Accordingly, plaintiffs' injuries are only traceable to, and redressable by, those defendants who are deemed by law to have employed them. *Cavallaro v. UMass Memorial Healthcare, Inc.*, No. 09-FDS2013, WL 360405, *3. Thus, the question of standing turns on whether plaintiffs have alleged that they were "employed" by this defendant, as that concept is interpreted in the context of the FLSA. *Id*. at *4.

Section 216 of the FLSA provides employees with a private right of action to sue their employers for failing to pay them minimum wage and overtime in accordance with Section 206 and 207 of the FLSA. 29 U.S.C. § 216. Specifically, section 216 states:

> Any **employer** who violates the provisions of section 206 or section 207 of this title **shall be liable to the employee or employees affected** in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215 (a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215 (a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction **by any one or more employees for and in behalf of himself or themselves and other employees similarly situated**. (emplasis added)

Id.

Indeed, assuming that a person can demonstrate the he or she is an employee that has been harmed by an employer as a result of that employer's FLSA violations, the United States Congress deputized them with the authority to prosecute the offending party. As a matter of course Congress did not allow just anyone to sue for damages under the FLSA, but instead made it clear that only an employee can bring an action. *See id*. Moreover, in order to further clarify this point, Congress defined "Employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," "Employee" as "any individual employed by an employer," and "Employ" as including the act of "suffer[ing] or permit[ing] to work." 29 U.S.C. §203(d), (e) and (g).

While Courts have often debated as to the breadth of the definition of "employee" within the context of the FLSA, under no scenario has a person with no affiliation to the defendant been granted standing to sue under the Act. *See Barfield v New York City Health and Hospitals Corp.*, 537 F. 3d 132 (2d Cir. 2008) (A certified nursing assistant who worked for three agencies controlled by New York City Health and Hospitals Corp. was found to be an employee of that defendant.); *Carter v. Dutchess Cmty. Coll*., 735 F.2d 8 (2d Cir. 1984) (Plaintiff, an inmate under the control of the New York State Department of Correctional Services, was determined to be an employee of Dutchess Community College for whom he was performing services); *Zheng v Liberty Apparel Co*., 355 F.3d 61 (2d Cir. 2003)(Garment workers hired by contractors who performed work for garment manufacturers were determined to be employees of the garment manufacturers for purposes of the FLSA); *Cavallaro v. UMass Memorial Healthcare, Inc.*, No. 09-FDS2013 WL 360405 (Plaintiff did not have standing to sue other companies where the complaint failed to set forth any specific allegation that implicated any defendant other than her direct employer.)[2]

Indeed, even if we apply the "economic reality" test used in this Circuit, plaintiffs would still be required to show that "the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Barfield*, 537 F.3d at 142 (quoting *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984)).

Here Mr. Diaz pleads absolutely no connection between himself and I. Hardware Distributors, Inc. Moreover, he cannot meet a single criteria under the "economic reality" test because he does not allege that I. Hardware Distributors, Inc. (1) had the power to hire and fire him, (2) supervised or controlled his schedule or conditions of employment, (3) determined the rate and method of payment, or (4) maintained employment records for him.

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[2] In *Cavallaro* the Court applied the economic reality test to determine that the majority of the defendants named in plaintiffs complain were not, in fact, her employers. *Cavallaro*, No. 09-FDS2013 WL 360405, * 4-7.

Given this utter lack of ability to allege even the most tenuous employee-employer relationship, it is blatantly clear that Mr. Diaz does not have standing to bring an action against I. Hardware Distributors, Inc. for alleged violations of the FLSA.

2. Serrano Fails to Adequately Plead That I. Hardware Distributors, Inc. Was His Employer

Other than a perfunctory statement suggesting that he may have worked at I. Hardware Distributors, Inc., Plaintiff Serrano does not plead a sufficient factual foundation to establish that he was employed by this defendant. In the Complaint, Mr. Serrano merely alleges that in September of 1999 he was hired by "Defendants to work as a stock person and cashier for Defendants' "Nunez Hardware" store located at 4147 Broadway, New York, NY 10033" and that he "also worked at Defendants' 756 West 181 Street, New York, NY 10033 and 2800 3rd Avenue, Bronx, NY 10455 locations." (Compl. ¶18) Without providing any additional details as to what years he worked there, Mr. Serrano says that he "worked for Defendants until on or about July 27, 2013." (Compl. ¶19)

The Complaint is clearly devoid of a sufficient degree of detail to enable defendant, I. Hardware Distributors, Inc. to frame a response.[3] *See, e.g., DeSilva v. North Shore-Long Island Jewish Health Sys.,* 770 F.Supp.2d 497, 508 (E.D.N.Y.2011) (employment sufficiently alleged when plaintiff stated where he worked, outlined his position, and provided dates of employment). As such, all claims brought by Mr. Serrano against I. Hardware Distributors, Inc. should be dismissed with prejudice.

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[3] Serrano's FLSA claims prior to July 27, 2010 would be time-barred under the applicable three year statute of limitations. The Complaint does not specifically allege that Serrano was employed by I. Hardware Distributors, Inc. after that date.

C. PLAINTIFFS FAILED TO ADEQUATELY PLEAD THAT JUVENAL NUNEZ WAS THEIR EMPLOYER

Nowhere in the complaint do Plaintiffs allege particularized facts to suggest that Mr. Nunez is an "employer" under the FLSA. The only paragraph in the Plaintiffs' complaint regarding Mr. Nunez states as follows "Upon information and belief, JUVENAL NUNEZ, is a principal of Defendant, I. HARDWARE DISTRIBUTORS, INC. d/b/a NUNEZ HARDWARE." (Compl. ¶ 9). This inference cannot rest solely on threadbare, boilerplate, legal conclusions, which are so speculative that they fail to cross "the line between the conclusory and the factual." *Twombly*, 550 U.S. at 557 n. 5.

Here, Plaintiffs' claims against Mr. Nunez must fail because they rely on just such "borderline" allegations. The allegations that seek to tie Mr. Nunez as Plaintiffs' employer are "so general and conclusory as to amount merely to an assertion that unspecified facts exist to conform to the legal blueprint." *Menard v. CSX Transp., Inc*., 698 F.3d 40, 45 (1st Cir.2012). In this case, the Complaint is completely devoid of facts to suggest that Mr. Nunez had the power to hire and fire employees, had the authority to determine the rates and methods of plaintiffs' payment, maintained employment records, or had the ability or responsibility to determine compliance with the FLSA. *See Irizarry v. Catsimatidis*, 722 F.3d 99, 102-103 (2d Cir. 2013).

Indeed, Plaintiffs' entire complaint is fatally flawed and must be dismissed with prejudice.

III. PLAINTIFFS' FAIL TO ADEQUATELY PLEAD UNPAID OVERTIME CLAIMS

A. Plaintiffs' Threadbare, Boilerplate, and Conclusive Allegations Fail to Adequately Plead an Unpaid Overtime Claim Under the FLSA

Section 207(a) of the FLSA requires that, "for a workweek longer than forty hours," an employee who works "in excess of" forty hours shall be compensated for that excess work "at a rate not less than one and one-half times the regular rate at which he is employed" (i.e. time and a half). 29 U.S.C. § 207(a)(1). Therefore, to survive a motion to dismiss, Plaintiffs must allege sufficient factual matter to state a plausible claim that they worked compensable overtime in a workweek longer than 40 hours. *See Lundy*, 711 F.3d 106, 114 (2d Cir. 2013) (dismissing FLSA overtime claims where plaintiffs alleged only that they "regularly worked hours both under and in excess of forty hours per week"); *Nakahata*, 723 F.3d at 199-201 (dismissing FLSA overtime claim where plaintiff alleged that she worked more than forty hours per week during "some or all weeks" of her employment"). A "plausible" claim contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise the right to relief above the speculative level…on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."

"In order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." *Lundy*, 711 F.3d at 114. In this case, Plaintiffs' Complaint fails to state a plausible claim that the FLSA was violated with respect to overtime compensation because Plaintiffs have not alleged a single workweek in which they worked at least 40 hours and also worked uncompensated time in excess of 40 hours such that Plaintiffs claims. Plaintiffs allegations fail to "provide some factual context that will nudge his claim from conceivable to plausible." *Dejesus v. HF Mgmt. Services, LLC*, 726 F.3d 85, 86 (2d Cir. 2013) (quoting *Twombly* 550 U.S. at 570).

The Complaint merely alleges that each plaintiff "worked over forty (40) hours per week" and "often worked over ten (10) hours per day." (Compl. ¶ 20, 24). The Complaint also alleges that Mr. Serrano "worked 6 days a week for an average of 62 hours per week" (Compl. ¶ 21) and that Mr. Diaz "worked 6 days a week for an average of 60 hours per week" (Compl. ¶ 25). These allegations are insufficient. *See Bustillos v. Academy Bus LLC*, No. 13 Civ. 565 (AJN), 2014 U.S. Dist. LEXIS 3980, at * 1-2 (S.D.N.Y. Jan. 13, 2014) (dismissing FLSA overtime claim where plaintiff alleged that he "regularly work[ed] from 60 to 90 hours per week"); *Spiteri v. Russo*, No. 12-cv-2780, 2013 U.S. Dist. LEXIS 128379, at *55 (E.D.N.Y. Sep. 7, 2013) (dismissing FLSA overtime claim where plaintiff alleged that he " worked approximately fifty (50) to sixty (60) hours per week").

As the Second Circuit explained in *Lundy*, Plaintiffs' allegations that they "averaged" and "often" worked overtime falls short of the degree of factual specificity required as they "supply nothing but low-octane fuel for speculation, not the plausible claim that is required." *Lundy*, 711 F.3d at 115. In short, this degree of "invited speculation does not amount to a plausible claim under FLSA." *Lundy*, 711 F.3d at 115.

In *Bustillos v. Academy Bus LLC*, just as in this case, plaintiff alleged that he "would regularly work from 60 to 90 hours per week." 2014 U.S. Dist. LEXIS 3980, at * 10-12. In light of the Second Circuit trilogy of *Lundy*, *Nakahata*, and *Dejesus*, the court concluded that plaintiff failed to adequately plead his claim for failure to pay overtime wages. As the court explained, the allegations "boil down to a conclusory assertion, without any supporting factual context, that the defendants violated the FLSA overtime provision because the plaintiff worked some number of excess hours in some unidentified week." *Id.* at *12.

In *Dejesus v. HF Management Services, LLC*, the plaintiff alleged that in "some or all weeks she worked more than forty hours a week without being paid 1.5 times her rate of compensation." 726 F.3d 85, 89 (internal quotation marks omitted). The Second Circuit nevertheless concluded that the plaintiff failed to state a plausible claim for relief because she did not "allege overtime without compensation in a *given* workweek," as required by *Lundy*. *Id.* at 90. (Citation and internal quotation marks omitted) (Emphasis added). The court explained that *Lundy's* requirement that plaintiffs allege with specificity a workweek in which they were entitled to but denied overtime payment, "was designed to require plaintiffs to provide some factual context that will nudge their claim from conceivable to plausible…" *Id. Lundy* requires plaintiffs to draw on their memory and personal experience to develop factual allegations with sufficient specificity that they plausibly suggest that defendant failed to comply with its statutory obligations under the FLSA. *See id.*

Plaintiffs' allegations in their complaint are so utterly devoid of content that the complaint must be dismissed in its entirety with prejudice.

IV. To the Extent Plaintiffs Are Found to Have Alleged Any Claims Against Defendants Under NYLL, The Court Should Decline to Exercise Supplemental Jurisdiction Over the State Law Claims

As detailed above, Plaintiffs have failed to allege any claims against Defendants. Nevertheless, should the Court determine that Plaintiffs have stated a claim under NYLL against any Defendant, this Court should decline to exercise supplemental jurisdiction over that claim.

Subject matter jurisdiction in this matter is premised on federal question jurisdiction over Plaintiffs FLSA claims under 28 U.S.C. § 1331, with supplemental jurisdiction over their state law claims pursuant to 28 U.S.C. § 1367. Compl. ¶ 4. A district court "may decline to exercise supplemental jurisdiction over a claim…if…the district court has dismissed all claims over which it has original jurisdiction." 13 U.S.C. § 1367. The decision to exercise supplemental jurisdiction is within the sound discretion of the district court and involves an assessment, at each stage of the case, of the values of judicial economy, convenience, fairness, and comity. *See*

Lundy, 711 F.3d at 117-18. "Once all federal claims have been dismissed, the balance of factors will usually point toward a declination." *Id.* at 118.

The Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims because none of the factors listed above counsel in favor of retaining jurisdiction. The litigation is at its earliest stages and the Court and parties have not invested significant resources in litigating or resolving the state law claims. Nor do principles of comity counsel in favor of the Court retaining jurisdiction. Courts in these circumstances have routinely declined to exercise supplemental jurisdiction and dismissed state law claims. *Bustillos v. Academy Bus, LLC*, No. 13-cv-565, at *3 (S.D.N.Y. January 13, 2014) *See, e.g., Dreher v. Doherty*, No. 12-cv-3385, 2013 U.S. App. LEXIS 17464, at *1 n.1 (2d Cir. Aug. 21, 2013) (unpublished) (noting district court's dismissal); *Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 218 n.1 (2d Cir. 2002) (same); *Cromwell*, No. 12-cv-4251, 2013 U.S. Dist. LEXIS 69414, at *11-13 (declining to exercise supplemental jurisdiction over NYLL claims after determining that FLSA claims were not adequately pleaded); *Yang Li v. Ya Yi Cheng*, No. 10-cv-4664, 2012 U.S. Dist. LEXIS 40241, at *16 (E.D.N.Y. Jan. 9, 2012) (noting that Second Circuit courts routinely decline supplemental jurisdiction in these circumstances).

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs FLSA and NYLL claims against I. Hardware Distributors, Inc. d/b/a Nunez Hardware, Juvenal Nunez and Irma Nunez in their entirety and grant any and all further relief as may be just and proper.

Dated: New York, New York
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